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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1404, Misc.

**DO-RIGHT AUTO SALES, TIMOTHY O'BRIEN, THOMAS
O'BRIEN, d/b/a DO-RIGHT AUTO SALES,**
Individually and on behalf of all others similarly situated,

Petitioners,

vs.

**THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT, and each**
Circuit Judge in regular active service thereon,

Respondents.

**PETITIONERS' MEMORANDUM IN REPLY TO
MICHAEL J. HOWLETT'S BRIEF IN OPPOSITION**

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**PETITIONERS' REPLY TO POINT I
OF HOWLETT'S BRIEF**

**The Issue Of The Validity Of Seventh
Circuit Rule 28 Is Not Moot.**

The Attorney General of Illinois, responding only on behalf of Michael J. Howlett, who is not named as a Respondent in the instant proceedings (See Howlett's Brief at 3), contends that the publication of *Valentino v. Howlett*, 528 F. 2d 975 (7th Cir. 1976), has rendered moot Petitioners' attack on the validity of Seventh Circuit Rule 28.

The opinion in *Valentino v. Howlett* is distinct from the opinion in *Valentino v. Lynch*. (The *Valentino v. Lynch* unpublished opinion is reproduced as Appendix B to the Petition). The *Valentino v. Howlett* opinion merely makes mention of the *Valentino v. Lynch* interlocutory proceedings. The *Valentino v. Howlett* opinion sets forth none of the legal reasoning crucial to an understanding of the *Valentino v. Lynch* ruling. The *Valentino v. Lynch* opinion, which provides this legal reasoning, remains unpublished and to this day its citation is prohibited by Seventh Circuit Rule 28.

Accordingly, Howlett's contention is without merit.

**PETITIONERS' REPLY TO POINT II
OF HOWLETT'S BRIEF**

**The Issue Of Whether Petitioners
Have A Right To A Three-Judge
Court Is Not Before This Court.**

In this proceeding Petitioners seek as relief, *inter alia*, an order upon the Seventh Circuit "to consider, in light of *Valentino v. Lynch*," the mandamus petition previously denied by the Seventh Circuit. They do not seek as relief an order by this Court convening a three-judge court.

In *Valentino v. Lynch*, the Seventh Circuit ordered the convention of a three-judge court. Yet Petitioners were not permitted to cite *Valentino v. Lynch* when they requested a similar ruling from the Seventh Circuit in a case Petitioners consider to be "on all fours" with *Valentino v. Lynch*. It is telling that Howlett, in his argument before this Court, omits any discussion on the merits of *Valentino v. Lynch*.

**PETITIONERS' REPLY TO POINT III
OF HOWLETT'S BRIEF**

**The Relief Sought Is Available
Only In This Court.**

Howlett, in his response, admits the significance of *Valentino v. Lynch* by stating "[t]he only case cited by petitioners where a writ was issued was in the *Valentino v. Lynch* unpublished order. (Howlett's Response at 15).¹

The Seventh Circuit, by its Rule 28, prohibited Petitioners' reliance on *Valentino v. Lynch*. In seeking affirmation of their First and Fourteenth Amendment rights, Petitioners are without recourse except to this Court. (See Point II of the Petition)

¹ Howlett's assertion that Petitioners' action in the Northern District of Illinois constitutes merely a claim that a statute is applied unconstitutionally is incorrect. Petitioners clearly attack the statute on its face. Accordingly, the affidavit of Secretary of State employee Jay L. Mesi, concerning his interpretation of the challenged statute, which Howlett has bandied about in the Court and in the Seventh Circuit, is not determinative. Moreover, the affidavit, evidentiary matter, was never submitted to the District Court wherein Petitioner would have an opportunity to cross-examine its maker.

CONCLUSION

The Seventh Circuit's response to the Petition remains to be filed. Nothing in Secretary Howlett's response satisfactorily addresses the only issue raised in the Petition: the validity of Seventh Circuit Rule 28.

Respectfully submitted,

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